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In the Supreme Court of the United States

OCTOBER TERM 1993

ROY McGINNIS and PEGGY MUSMECI
Petitioners

VERSUS

DONNA SHALALA
Respondent

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the definition of *excusable neglect* as enunciated by the United States Supreme Court in *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership, et al*, 113 S.Ct. 1489, 123 L.Ed.2d 74, applies to the Federal Rules of Civil Procedure, Rule 6(b) which also uses the phrase excusable neglect and Federal Rule of Civil Procedure, Rule 4(j) which uses the phrase *good cause* or if Pioneer investment's *excusable neglect* only is appropriate in a bankruptcy proceeding.

2. Whether the criteria established by the Federal Second, Fourth, and Ninth Circuits to determine what is good cause for purposes of Federal Rule of Civil Procedure, Rule 4(j) should be the law of the land as compared to the Federal Third and Fifth Circuits' method of determining what is good cause.

3. Whether Peggy Musmeci and Roy McGinnis demonstrated good cause for their failure to physically deliver the summons and complaint to the local United States Attorney within the 120 day limit of Federal Rule of Civil Procedure, Rule 4(j).

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The opinion of the United States Court of Appeals, Fifth Circuit entered on August 11, 1993, the motion for rehearing overruled on September 15, 1993 are attached in the Appendix.

The decisions of the District Judges granting the United States Government's Motion to Dismiss and their respective reasons for said decisions are also attached in the Appendix.

The Report and Recommendations of the two Magistrate Judges on the United States's Motion to Dismiss are in the Appendix along with the Magistrates' original orders dismissing the United States Government's Motion to Dismiss.

JURISDICTION

This action for judicial review of a denial of an application for Social Security benefits was authorized under 42 USCA 405(g)

The United States Government filed a Motion to Dismiss which was originally denied by the Magistrate Judges, who were automatically referred the cases. The District Court Judges, however, ruled in favor of the Government on their Motions to Dismiss and a timely appeal followed to the United States Court of Appeals, Fifth Circuit under the authority of USCA 28§1291. The Fifth Circuit affirmed the District Court's decision on August 11, 1993.

(Copy is attached in Appendix). The Fifth Circuit overruled plaintiffs' motion for rehearing on September 15, 1993. (Copy is attached in Appendix). This Writ of Certiorari then followed.

The United States Supreme Court has jurisdiction of this Writ of Certiorari under USCA 28§1254 and the Constitution of the United States of America, Article II, Section 2. This case involves a Federal Question dealing with an interpretation of Federal Statues, USCA 42§405 (g) and USCA FRCP 4(j) and 6(b).

FRCP Rule 4(j) - See Page 14

FRCP Rule 6(b):

> Enlargement; When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

STATEMENT OF THE CASE

Plaintiffs, Roy McGinnis and Peggy Musmeci, filed suit on July 5 and July 17, 1991, (respectively) seeking judicial review of the decision of the Secretary of Health and Human Services denying their applications for disability benefits and supplemental security income under Titles II and XVI of the Social Security Act. Both cases were automatically referred to the Magistrate Judges for District Court Judge Marcel Livaudais and District Court Judge George Arceneaux.

Plaintiffs' counsel sent via certified mail copies of the summons and complaint to (A) local United States Attorney; (B) Attorney General in Washington, D.C.; (C) Louis W. Sullivan, Secretary of HHS. The local United States Attorney on July 16, 1991 (McGinnis) and July 24, 1991 (Musmeci) wrote plaintiffs' counsel acknowledging receipt of the summons and complaint but also requesting that they be physically given a copy.

Plaintiffs' counsel had a summons and complaint reissued for the local United States Attorney on October 21, 1991 within the 120 day time limit of FRCP, Rule 4(j). Plaintiffs' counsel, after checking with private process servers, gave the summons and complaint to a member of his staff to serve within the 120 day time limit. The service was accomplished by a member of his staff on December 9, 1991, twenty-five days outside the 120 day limit.

On December 4, 1991 the United States Attorney filed a motion to dismiss before the Magistrate Judges under FRCP, Rule 4(j). The two cases then proceeded as follows.

MUSMECI

On January 8, 1992 Magistrate Lemelle filed an order denying the United States Attorney's motion to dismiss in Musmeci. On January 17, 1992 the United States Attorney filed a motion for relief from order and/or objection to findings, report and recommendation. Plaintiff filed opposition to the motion; however, the District Judge remanded it back to the Magistrate to make findings of fact and recommendations.

Then on April 21, 1992 the Magistrate recommended that the United States Attorney's motion to dismiss be granted. Plaintiff filed an opposition to those findings and recommendations; however, the District Judge adopted them on June 2, 1992 and dismissed plaintiff's case.

McGINNIS

The Magistrate Judge reviewing McGinnis' complaint filed a report and recommendation in which she recommended that the Government's motion to dismiss be denied. The District Court, however, ordered that the Government's objections to the report be maintained and granted the Government's motion.

Both McGinnis and Musmeci timely appealed their dismissals. On August 11, 1993 the United States Court of Appeals for the Fifth Circuit affirmed the decisions of the two District Court Judges for the Eastern District of Louisiana.

Plaintiffs' counsel on August 25, 1993 filed a Peti-

tion for Rehearing on behalf of appellants, Roy McGinnis and Peggy Musmeci. The Fifth Circuit dismissed the request for rehearing on September 15, 1993 and plaintiffs then filed their Writ of Certiorari to the United States Supreme Court.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

The Fifth Circuit has previously said that in order to establish good cause for extending the 120 day period for service under Federal Rules of Civil Procedure 4(j) the party must show at least *excusable neglect. Winters v. Teledyne Movible Offshore, Inc.,* 776 F.2d 1304 (5th Cir. 1985).

The Fifth Circuit has also said that actions falling in the category of inadvertence, mistake or ignorance of counsel are not excusable neglect. *Traina v. United States,* 911 F.2d 1155 (5th Cir. 1990).

However, the United States Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 113 S.Ct. 1489, 123 L.Ed.2d 74 decided on March 24, 1993, has re-examined what is excusable neglect and thus has redefined what can be good cause under Federal Rules of Civil Procedure 4(j).

The United States Supreme Court's foray into the excusable neglect arena occurred in a Bankruptcy proceeding interpreting Bankruptcy Rule 9006(b)(1) which allows a court to permit late filings where the movant's failure to comply with the deadline was the result of *excusable neglect.* In *Pioneer,* the movant and his attorney

had gotten notice of the bar date for filing claims in a letter entitled "Notice of Meeting of Creditors: from the bankruptcy court. However, the movant and his attorney filed their claims beyond that bar date. The lower court just like the Fifth Circuit in the present case said that inadvertence, mistake or ignorance of counsel are not excusable neglect unless it is beyond one's control. The United States Supreme Court changed that in *Pioneer.*

In holding that the movant and his attorney's actions were excusable neglect, the United States Supreme Court looked for guidance from the Federal Rules of Civil Procedure where the term excusable neglect is also used; specifically, Federal Rules of Civil Procedure 6(b). The court also sought assistance from the ordinary definition of neglect.

> The ordinary meaning of "neglect: is 'to give little attention or respect to a matter', or closer to the point for our purposes, 'to leave undone or unattended to *especially through carelessness*'.
>
> Webster's Ninth New Collegiate Dictionary 791 (1983). (emphasis added).
>
> *Pioneer* at 7-8.

The United States Supreme Court held that Congress contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control. In taking this approach the United States Supreme Court adopted the

Ninth Circuit's analysis which was to look into all relevant circumstances to determine *excusable neglect.*

> These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. See 943 F.2d, at 677.
>
> *Pioneer* at 15.

In applying these factors the United States Supreme Court ruled:

> As the Court of Appeals found, the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.
>
> *Pioneer* at 17.

Pioneer's test for establishing excusable neglect is not limited to Bankruptcy Rules as the Fifth Circuit suggested in its footnote to its opinion in this case. The United States Supreme Court looked at excusable neglect in all areas of the law in fashioning the *Pioneer* decision including Federal Rules of Civil Procedure 6(b) which is directly applicable in these cases.

Federal Rule of Civil Procedure 6(b) says excusable neglect and 4(j) says good cause.

When the United States filed a motion to dismiss under FRCP 4(j) and we filed an opposition to it we were not only asking for a good cause exception but also for the court under FRCP 6(b) to enlarge the time within which to effect service on the defendant, United States. The fact that we did not file a motion to enlarge the time for service under FRCP 6(b) should not preclude its application in this case. When we filed an opposition to the Motion to Dismiss we were doing the same thing as filing a motion to enlarge the time to make service under FRCP 6(b).

If the good cause exception had been granted, as was done by both magistrates initially, the district court would have in effect enlarged the time (120 days) to serve the defendant, United States.

Pioneer may run against the grain of previous Fifth Circuit rulings about excusable neglect. But it is now the law of the land and this court must follow it.

> "Lower courts are bound by both United States Supreme Court's choice of legal standard or test and by result it reaches under that standard or test".
>
> - *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 947 F.2d 682, certiorari granted in part 112 S.Ct. 931, 117 L.Ed. 2d 104 and 112 S.Ct. 932 (3rd Cir. 1991).

"Supreme Court does not sit to decide cases that will control only cases having identical facts."

- *United States v. Takubu,* 936 F.2d 936, 939 (7th Cir. 1991)

The Fifth Circuit has said that in determining what is good cause in Federal Rules of Civil Procedure 4(j) it is at least excusable neglect. *Winters v. Teledyne Movible Offshore, Inc.,* 776 F.2d 1304 (5th Cir. 1985). Therefore, if the United States Supreme Court says that to determine excusable neglect you must follow the test or criteria set up in *Pioneer,* then it logically follows that the same test would apply in determining good cause. If A(Excusable Neglect) = B(Good Cause) and A(Excusable Neglect) = C(*Pioneer* test) then B(Good Cause) = C(*Pioneer* test). The *Pioneer* test should be used in the McGinnis and Musmeci cases.

Let us look again at our case in light of the United States Supreme Court's decision in *Pioneer* that excusable neglect determinations should include certain equitable criteria.

(1) *Danger of Prejudice* - The United States is well aware of Peggy Musmeci and Roy McGinnis' claims having acknowledged receipt of same and would suffer no prejudice.

(2) *Length of Delay* and its potential impact on judicial proceedings - The twenty-five (25) day delay for service on the United States would have no effect on these judicial proceedings.

(3) *Reasons for the Delay* including whether it was within the reasonable control of the movant and whether he acted

in good faith - The reason for delay was that a member of my staff (clerical error) did not physically deliver it to the local United States Attorney in the three (3) weeks from the reissuance of the summons, but instead twenty-five (25) days following the 120 day limit of Federal Rules of Civil Procedure 4(j). The delay was not caused by indifference or ignorance of the rules and we acted in good faith. Even the United States Attorney in his brief acknowledged our good faith but he feels good faith is irrelevant.

II.

ARGUMENT FOR WRIT APPLICATION

Federal Rules of Civil Procedure, Rule 4(j) sets up the consequences for failure to serve a defendant within 120 days.

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

This 1983 Amendment to the Federal Rules of Civil Procedure did not define "good cause" instead it left that up to the Courts. The legislative notes following the Amendment helped to define good cause and those legislative notes even considered the potential problem the courts may be faced with when dismissing a suit under

Rule 4(j) that may have an adverse affect to the plaintiff because of the applicable statute of limitation. The legislative notes stated:

> If the plaintiff has not been diligent, the court will dismiss the complaint for failure to serve within 120 days, and the plaintiff will be barred from later maintaining the cause of actions because the statute of limitation has run. . . . If, on the other hand, the plaintiff has made reasonable efforts to effect service, then the plaintiff can move under Rule 6(b) to enlarge the time within which to serve or can oppose dismissal for failure to serve. A court would undoubtedly permit such a plaintiff additional time within which to effect service. Thus, a diligent plaintiff can preserve the cause of action.
>
> P. 138, 28 USCA *FEDERAL Rules of Civil Procedure,* Rules 1 - 11, 1991 Supplementary Pamphlet.

In determining what is and what is not good cause, the courts will be forced to balance the clear intent of Rule 4(j) and the desire to provide litigants their day in court. A timely service of process and a just adjudication on the merits of an action are not inconsistent, but over-emphasis on either could lead to undesired consequences. If good cause is measured too restrictively, then too many good faith plaintiffs may be treated harshly. If good cause extensions are given too freely, then the risk is the emasculation of Rule 4(j). It will take some years of case law development to

> determine the meaning of good cause, and it can only be hoped that a desirable equilibrium balancing the need for speedy process and the ideal of just adjudication will be struck by the courts.
>
> Wright and Miller, *Federal Practice and Procedure* §1137, p. 391-392.

Since 1983 the Federal Appeals courts have sought to define what is good cause. The Second, Fourth and Ninth Circuits have adopted certain criteria which are more lenient in determing what is good cause. Whereas, the Federal Fifth Circuit and Third Circuit have adopted a more stringent definition of good cause. This area is thus ripe for the United States Supreme Court to establish what criteria should be used to determine good cause. It will make for more uniformity in 4(j) cases around the country and will lessen the surge of motions to dismiss and motions to enlarge which are clogging our already burdened Federal Courts.

The Second, Fourth and Ninth Circuits have taken a softer approach to the need for speedy litigation as it relates to Rule 4(j).

> Courts in this circuit (Second) consider two factors when determining whether plaintiff has demonstrated good cause under Rule 4(j): (1) the plaintiff's reasonable efforts to effect service, and (2) the prejudice to the defendant from the delay.

National Union Fire Ins. v. Barney Assoc., 130 FRD 291, 293 (S.D.N.YH. 1990).

The plaintiffs did make reasonable efforts to effect service. They served the Attorney General of the United States properly; they served the Agency of the United States that made the ruling properly; and they did serve via certified mail a copy of the summons and complaint on the U.S. Attorney here locally. In October, 1991 plaintiffs also had the summons re-issued for the United States Attorney here locally within the 120 day limit. They contacted several people concerning service then gave same to a member of counsel's staff to personally serve within the 120 day limit. However, the service was done manually on December 9, 1991, some 25 days outside the limit. Finally, there was no prejudice to the defendant for this delay.

> Rule 4 is to 'be given a liberal and flexible construction.' (Citations omitted) *Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984). Where the service requirements are not met dismissal of the complaint is not always required. Failure to comply with service requirements does not require dismissal if (a) the party to be served received actual notice, (b) no prejudice to the defendant resulted from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if the complaint were dismissed. *Borzeka v. Heckler, supra*, at 447. See also *Hart v. U.S.*, 817 F.2d 78, 90 (9th Cr. 1987); *Whale v. U.S.*, 792 F.2d 951, 953 (9th Cir. 1986); *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

Justice v. Lyng, 716 F.Supp. 1567, 1569-1570 (D. Ariz. 1988).

A review of the four criteria set up in *Justice* again shows that Peggy Musmeci and Roy McGinnis' cases should not be dismissed.

(1) Two-thirds of the service on the United States was completed and the U.S. Attorney locally did receive a copy of the summons and the complaint and acknowledged such receipt.

(2) There was no prejudice to the U.S. Attorney from the defect in the service.

(3) There is a justifiable excuse for the failure to serve properly. The justifiable excuse is that the defendant had not filed an answer in which he clearly raised his exception to the service nor did he file a motion for insufficiency of service of process prior to the 120 day deadline of Rule 4. The local United States Attorney had acknowledged receipt of the summons and complaint. Also, plaintiff had the summons and complaint re-issued for the United States Attorney and had given it to a member of his staff for service within the 120 day limit.

In some instances you can look to the behavior of the defendant in determining whether there has been a justifiable excuse for the failure of the plaintiff to serve properly. In *Zankel v. U.S.*, 921 F.2d 432 (C.A. 2nd Cir. 1990) the Second Circuit took note that the United States belatedly informed the plaintiff of the specific character of their service defect and that they deliberately deferred their motion to dismiss until after the expiration of the 120 day period. The Court found that the U.S.'s behavior was

unacceptable and cited *Vance v. U.S.*, 126 FRD 14, 15n 1 (E.D.N.Y. 1989) to support their position.

> It is reprehensible for the U.S. Attorney to wait until after the 120 days for service under Rule 4(j) to have expired along with the statute of limitations prior to making this motion to set aside the service as insufficient.
>
> *Id.* at 15.n 1.

A review of the defendant's actions in this case as well as the plaintiff's actions permits a finding of justifiable excuse in not clearing the technical defect of service within the 120 days of Rule 4.

(4) There is severe prejudice to Peggy Musmeci and Roy McGinnis if their suit is dismissed since the statute of limitations has run for the filing of their objection to the agency's ruling.

In *Zankel v. U.S., supra*, the court also explained that when a technical sevice defect is missing then the courts must also reconcile not only Rule 4(j) but also Rule 4(d)(4).

> However, as will be seen below, the circumstances of this case are not ordinary. To begin with, the disposition of this appeal does not rest solely on an interpretation of Rule 4(j). Since we are concerned with service upon the United States, Rule 4(d)(4), quoted above, is also involved. Moreover, Rule 4(j) states that a party's action 'shall be dismissed' if a service of the summons and complaint is not made upon a defendant within 120

> days after the filing of the complaint (emphasis added). In the present case, the defendant is the United States, not the Attorney General. Plaintiffs actually effected at least partial service upon the United States a week after filing, by delivering the summons and complaint to the United States Attorney. The question, then, is whether under the specific facts of this case plaintiff's failure also to mail a copy of the summons and complaint to the Attorney General within 120 days constituted failure under Rule 4(d)(4) to serve the defendant United States.
>
> It is settled law in this circuit that Rule 4(d)(4) is 'mandatory' and not merely 'discretionary', so that effective service cannot be accomplished merely by delivering a copy of the summons and complaint to the United States Attorney and not mailing a copy to the Attorney General. *Messenger v. U.S.*, 231 F.2d 328, 330 (2nd Cir. 1956).
>
> Nonetheless, several circuits have also held that Rule 4(d)(4) should not be construed so narrowly or rigidly as to prevent relief from dismissal in every case in which a plaintiff's method of service suffers from a 'technical defect'. *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984); *Jordan v. U.S.*, 694 F.2d 833, 836 (D.C. Cir. 1982) (per curiam).
>
> *Zankel v. U.S.* at 436.

The court in *Zankel* then went on to list the four requirments that were previously outlined in *Justice*.

Plaintiff's service on the United States Attorney was two-thirds complete and only needed the U.S. Attorney to be hand-delivered the summons and complaint which he had already acknowledged receiving in the mail. Counsel's efforts to effect service within 120 days were reasonable and diligent. See *Voorhees v. Fischer & Krecke,* 697 F.2d 574, 576 (4th Cir. 1983); *Ruppert v. Secretary, U.S. Dept. Health & Human Services,* 671 F.Supp. 151, 189 (E.D.N.YH. 1987), modified on other grounds, *Ruppert v. Bowen,* 871 F.2d 1172 (2nd Cir. 1989).

The Federal Fifth Circuit's method to determine *good cause* under FRCP 4(j) is more restrictive and not in line with the general rule that FRCP 4 is to be interpreted liberally.

The Fifth Circuit in *Winters v. Teledyne Movible Offshore, Inc.,* 776 F.2d 1304 (C.A. 5th Cir. 1985) talked about what is good cause.

> Without attempting a rigid or all encompassing definition of 'good cause', it would appear to require at least as much as would be required to show excusable neglect as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice, and some showing of 'good faith' on the part of the party seeking an enlargement and some reasonable basis for non-compliance within the time specificed is normally required. 10 Wright and Miller, *Federal Practice and Procedure:* Cvil §1165 at 622. (emphasis added).
>
> *Winters, supra* at 1306.

So good cause encompasses due diligence, reasonable efforts, good faith and excusable neglect. However, the Fifth Circuit has said that actions falling in the category of inadvertence, mistake or ignorance of counsel are not excusable neglect. *Traina v. U.S.*, 911 F.2d 1155 (5th Cir. 1990) which conflicts with the criteria set up by the Second, Fourth and Ninth Circuits. But even under that stricter interpretation Peggy Musmeci and Roy McGinnis demonstrated good cause. The record reflects that the plaintiffs made service on the Attorney General and the involved agency and sent the local United States Attorney notice of the suit via certified mail. The local United States Attorney acknowledged the receipt of the summons and complaint. Plaintiff's counsel also timely secured another summons to have physically delivered to the local United States Attorney. (Record, p. 121). He also timely instructed a member of his staff to serve the papers on the United States Attorney; however, they did not serve it until December 9, 1991, twenty-five days after the 120 day time limit. (Record, p. 109).

The efforts made by counsel to physically deliver to the United States Attorney a copy of the summons and complaint which they had already received and acknowledged were reasonable and constituted good cause.

In *Smith v. Century Ins.*, 674 F.Supp. 1459 (N.D. Ga. 1987) the court held that a process server's negligence was good cause for an attorney's failure to serve complaint in the 120 days.

In view of this evidence, the court concludes that

> plaintiff's failure to effect proper service on defendants is due in large part to the process server's negligence; i.e. failure to insure that the person receiving service was so authorized, failure to complete the return accurately, etc. While more diligence on the part of plaintiff's counsel conceivable could have revealed the defects in service prior to the expiration of the 120 day period, the court believes reasonable diligence was exercised.

Id. at 1463.

The United States Government has been the beneficiary of a reasonable diligence standard when they have failed to serve a defendant in 120 days. In *United States v. Cozza*, 106 FRD 264 (U.S.D.C. N.Y 1985) the United States commenced a civil action against Jack Cozza, Inc. for certain federal tax liabilities. The United States Attorney delivered to the Marshall the summons and complaint. The Marshall mailed them to the defendant along with the 299 Acknowledgement Form. The form was never returned to the United States Attorney or the United States Marshall. One month before the expiration of the 120 day limit the United States Marshall realized that the acknowledgement form had not been returned and therefore they set up a summons and complaint for personal service. The papers were given to the Marshall for personal service which was attempted unsuccessfully three times. All attempts were made after the 120 day time limit. The United States Marshall's office explained the delay as follows:

> Miss Starret testified that the delay in attempting personal service was due to the backlog of complaints for personal service, the intervening

> holidays and the processing delay resulting from transmission of the papers to the Marshall's office in White Plains for service.

Id. at 266.

The court concluded that the United States had demonstrated due diligence in making service and therefore there was good cause for extension of the 120 day period of Rule 4(j).

The old saying is that what is good for the goose is good for the gander. If the United States Attorney's office with its boundless resources had a month to personally serve Jack Cozza and does not, then they should not complain that counsel had three weeks to physically serve the local United States Attorney but did not. Furthermore, the United States should be consistent in their behavior. They should not be allowed to argue in one circuit that their behavior constitutes good cause and then argue in another circuit that that same behavior but this time applied to someone else does not constitute good cause.

The term "good cause" is also used by the Fifth Circuit in granting extensions of time to file briefs. The Fifth Circuit when the record is lodged, has the clerk send out a notice outlining their policy on extensions:

> For these reasons we are under instructions from the court that where extensions are requested they are to be sparingly given and only for good cause.

The thinking of the court is that a "delay in briefing

is a delay in calendaring". The same logic applies with the 120 day time limit for service. The legislature wanted to speed up the process and therefore required that service be completed in 120 days unless one could show good cause for any extension. This brings us to the *Roy McGinnis v. Louis W. Sullivan* case, No. 92-3269, United States Court of Appeal for the Fifth Circuit, which case has been consolidated with Peggy Musmeci's case.

The United States Attorney filed a motion for extension of time to file their briefs on June 30, 1992. In their motion they explain that there was a miscommunication between the regional counsel for HHS and the local United States Attorney. Each office felt that the other was doing the brief. When they learned of the mistake the United States Attorney then moved for an extension of time arguing that there was good cause for this extension because of the miscommunication. The miscommunication betweeen the regional counsel for HHS and the local United States Attorney's office can only be classified as a mistake or simple inadvertence on the parts of the attorneys and as we already know simple inadvertence and attorney mistake or ignorance of the rules is not grounds for a good cause exception. *Winters v. Teledyne, supra.* However, this Circuit granted the Government's request for an extension of time and held that under the circumstances their explanation did constitute good cause. If that is good cause then surely my getting the summons and complaint re-issued within the 120 days is also good cause for an extension of the Rule 4(j) requirements.

A review of the circuit court decisions relied on by the United States Government in their motions to dismiss

are distinguishable from plaintiffs' case.

In *Braxton v. U.S.*, 817 F.2d 238 (C.A. 3rd Cir. 1987) the plaintiff's counsel turned over the process to a private server. The server was to mail copies to the United States Attorney General and the affected agency and then personally serve the local United States Attorney. The plaintiff's attorney contacted the process server three months later and found that nothing had been done. Subsequently, the 120 day limit ran and the motion was filed. The court did not grant an extension but held that the attorney was simply inadvertent for not following up on the process server when he knew three months after filing suit that he was dilatory.

This is not the case here. First, two-thirds of the service had been done - the Attorney General and the Social Security Agency had both been served. The local United States Attorney had received a copy of the summons and complaint and had acknowledged receipt of that summons and complaint. I had the court re-issue the summons, I checked with private process servers and gave it to a member of my staff to serve all within three weeks before the deadline.

In *Winters v. Teledyne*, 776 F.2d 1304 (C.A. 5th Cir. 1985) the plaintiffs never attempted to serve the defendant in the federal suit because there was no need to incur

> the added cost of suing Manitowoc since it had been timely served in the state suit, and the state suit had been removed to the same federal court as that in which the present suit was pending

> (although it was pending before a different judge), and the two suits were on precisely the same cause of action.
>
> *Id.* at 1306-1307.

This is not the basis for good cause in this case.

In *Traina v. U.S.*, 911 F.2d 1155 (C.A. 5th Cir. 1990) the plaintiff's position was that service was properly effected by certified mail. She erroneously relied on an invalid service. The court said that that was not excusable neglect or good faith. In our case, I did not rely on the technical service or acknowledgement. I got the summons re-issued and gave it to a member of my staff to make service within the 120 day limit.

In *McDonald v. U.S.*, 898 F.2d 466 (C.A. 5th Cir. 1990) plaintiff served the United States with certified mail but the acknowledgment forms were not sent back. The attorney thought service was made. The court held that that was ignorance of the rule or a mistake of the attorney. That case would apply to Peggy Musmeci and Roy McGinnis' case situation if our only claim for good cause was that I thought the acknowledgement was service and did nothing else. But I did not stop there. I had the summons re-issued and gave it to a member of my staff for service.

In *Virginia Collins v. Louis Sullivan*, Civil Action No. 91-1820 (E) (Record, p. 66 - 72), Miss Collins did receive a letter about inadequate service but she never acted on the letter. Plaintiff's counsel said he was not aware of the letter and it was not handled in his typical fashion. He did not state he never received the letter but only that he did not see it and thus did not act on it. This was held to be simple

inadvertence or mistake.

This is different than these cases. I did act on the letter. I did make other reasonable efforts to correct the service defect. Miss Collins did not.

In *Stokes v. The United States of America,* No. 87-5623 summary Calendar, U.S. Court of Appeals from the United States District Court for the Western District of Texas, decided September 8, 1988 (Record, p. 74 - 80) the plaintiff's counsel told a member of his staff to personally serve the papers. That member said they again contacted the United States Attorney's office and someone in the office told them that the previous mail service was sufficient. The Court felt it was good faith but not good cause. But we did more. We actually had the clerk's office timely re-issue the necessary summons, we checked with a private process server and then timely instructed a member of my staff to personally serve the papers. We did not rely on erroneous information from the United States Attorney's office.

The attempts taken by counsel to effect service on the local United States Attorney were reasonable and constituted due diligence and thus good cause. The standard is not perfection but due diligence.

RESPECTFULLY SUBMITTED,

/s/ Sheila C. Myers

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Writ of Certiorari has been served upon the following named individuals by placing a copy of same in the U.S. Mail, postage prepaid, this 13th day of December, 1993.

Solicitor General
Department of Justice
Washington, D.C. 20530

Donna Shalala, Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20210

Glenn K. Schreiber
Assistant U.S. Attorney
501 Magazine Street
Room 205
New Orleans, LA 70130

/s/ Sheila C. Myers

SHEILA C. MYERS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3269
Summary Calendar

FILED
AUG 11 1993

ROY McGINNIS,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary
of Health and Human Services,

Defendant-Appellee.

* * * * * * * * * * *

No. 92-3568
Summary Calendar

PEGGY MUSMECI,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary
Department of Health and Human Services,
Defendant-Appellee.

Appeals from the United States District Court for the
Eastern District of Louisiana
(CA-91-2440-E)

Before GARWOOD, DAVIS and EMILIO M. GARZA, Circuit Judges.*

PER CURIAM:

Roy McGinnis (McGinnis), appellant in No. 92-3269, and Peggy Musmeci (Musmeci), appellant in No. 92-3568, both filed suit against the Secretary of Health and Human Services (the Secretary) seeking judicial review of his denial of their claims for disability benefits. In each case, the district court dismissed the action under Federal Rule of Civil Procedure 4(j) for failure to effect service of process within 120 days of the filing of the complaint. The two cases were consolidated for appeal due to the similarity of facts and issues of law. We affirm.

Facts and Proceedings Below

The facts of these cases are sufficiently similar that they can be described in tandem. McGinnis and Musmeci (collectively, appellants) filed their complaints against the Secretary on July 5 and July 17, 1991, respectively. Both were represented by counsel Harry E. Forst. Forst sent copies of the summons and complaints by certified mail to the United States Attorney in New Orleans, the United States Attorney General, and the Secretary. The United States Attorney received these service attempts on or about July 16, 1991 (McGinnis), and July 23, 1991 (Musmeci), and shortly thereafter informed appellants by

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

letter that their attempts at service were defective and that he would not file an answer or other pleading until properly served. Forst had summons reissued in both cases on October 21, 1991, which was still within the 120-day period, but failed to effect proper service on the United States Attorney until December 9, 1991. On December 4, 1991, the Secretary moved to dismiss the actions under Rule 4(j) on the ground that more than 120 days had lapsed since appellants had filed their complaints. Each case was automatically referred pursuant to local rule to a magistrate judge and thereafter traveled a slightly different path to this Court.

The magistrate judge reviewing McGinnis' complaint filed a report and recommendation in which she recommended that the government's motion to dismiss be denied. The district court, however, ordered that the government's objections to the report be maintained and granted the government's motion. The magistrate judge in Musmeci's case issued a finding and recommendation recommending that the government's motion to dismiss be granted. The district court adopted the recommendation and dismissed Musmeci's complaint. Both McGinnis and Musmeci timely appealed their dismissals.

Discussion

Rule 4(j) of the Federal Rules of Civil Procedure provides:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show

> good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion."

It is undisputed in this case that appellants failed properly to serve process within the 120-day period. Rule 4(d)(4) requires *inter alia* that in suits against the United States a copy of the summons and complaint be delivered to the United States Attorney for the district in which the action is brought (and a copy properly *mailed* to the Attorney General in Washington, D.C.). "Service" by mail on the United States Attorney does not suffice under Rule 4(d)(4): *Prisco v. Frank,* 929 F.2d 603 (11th Cir. 1991); *McDonald v. United States,* 898 F.2d 466 (5th Cir. 1990). Thus, appellants failed properly to serve the United States Attorney when they sent their summons and complaints by certified mail. Appellants do not dispute this. When they finally did effect proper service on December 9, 1991, the 120-day period had long expired, as both suits were filed in mid-July of 1991.

Appellants argue that, because they had good cause for failing to effect timely service of process, it was error for the district courts to dismiss their complaints. They also argue that the government waived any defect in service. Finally, Musmeci (only) argues that, because the magistrate judge in her case presided as an Article III judge under 28 U.S.C. § 636(c), the district court lacked jurisdiction to consider a matter appealable to this Court. Each of these arguments lacks merit.

Under Rule 4(j), dismissal of a plaintiff's complaint is required in the absence of a showing of good cause why service was not timely made. *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1305 (5th Cir. 1985). In such cases, the plaintiff bears the burden of proving good cause. *Id.* at 1305. We review a district court's ruling as to the absence of good cause for abuse of discretion only. *McDonald*, 898 F.2d at 468; *George v. United States Department of Labor*, 788 F.2d 1115, 1116 (5th Cir. 1986).

Appellants' counsel argues that the good cause requirement is satisfied in this case because he acted in good faith at all times and because he had the summons and complaints reissued before the expiration of the 120-day period and gave them to his secretary to serve. We cannot agree. We have said that good cause "would appear to require *at least* as much as would be required to show excusable neglect." *Winters*, 776 F.2d at 1306 (original emphasis), and that "[a]ctions falling into the category of inadvertence, mistake or ignorance of counsel are not excusable neglect and do not establish good cause for extending the 120 day period for service." *Traina v. United States*, 911 F.2d 1155, 1157 (5th Cir. 1990); *accord McDonald*, 898 F.2d at 467, *Winters*, 776 F.2d at 1306.[1] We have also sustained dismissals for defective service on grounds that the plaintiff received adequate notice of the

---

[1] *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.* Partnership, 113 S.Ct. 1489 (1993), cited by appellants in a supplemental brief, does not alter our analysis. That case interpreted Bankruptcy Rule 9006(b) (1), which empowers a court in Chapter 11 proceedings to permit a creditor to file a late proof of claim upon a showing of excusable neglect. In our view, the mode of analysis appropriate to Rule 9006(b) (1) is not necessarily appropriate to Rule 4(j) if only because the standard articulated in Rule 4(j) is good cause, not *excusable neglect.*

defect. *Trina*, 911 F.2d at 1157; *Systems Signs Supplies v. United States Dep't of Justice*, 903 F.2d 1011, 1013-14 (5th Cir. 1990). Here, appellants' counsel learned that his initial efforts at service of process were defective soon after the United States Attorney received the complaints and summons. Yet he waited months before he had the summons reissued on October 21, 1991. Even then, he still had three weeks to serve process, but failed to do so. That appellants' counsel had instructed his secretary to serve the papers upon the United States Attorney (explained as a desire to avoid the cost of hiring a process-server) is surely not good cause or (even) excusable neglect. The record reflects that the United States Attorney's Office in New Orleans is only a few blocks away from the office of appellant's counsel. The district court in McGinnis' case ruled that his failure to effect timely service "is attributable solely to his own neglect." The court in Musmeci's case found "no reasonable basis" for her failure to properly serve the United States Attorney. It was well within the discretion of these courts to rule that appellants had not demonstrated good cause.

Contrary to appellants' argument, it is not determinative that the delivery of the summons and complaints by certified mail gave the government sufficient notice or actual knowledge of the suit. Rule 4(j) requires service to be timely made unless good cause for the delay is shown. It is likewise not determinative that the government was not prejudiced by the late service. Finally, it is not determinative that, by virtue of the applicable statutes of limitations, appellants' suits will now be time barred. We have rejected this argument in prior cases and must do so again now. *Traina*, 911 F.2d at 1157; *McDonald*, 898 F.2d

at 468; *Winters*, 776 F.2d at 1307.

Appellants also make three arguments to the effect that the government waived the requirements of Rule 4(j). First, McGinnis argues that, because the magistrate judge in his case issued a briefing schedule on July 11, 1991, the government's failure to oppose the briefing schedule caused him to believe that it had waived any defect in service. The briefing schedule could not have misled McGinnis, however, because it was issued *before* the insufficient service was performed. Nor was the government under any obligation to object to a briefing order in a case in which it had not properly been served. Second, appellants argue that the government waived any service defects because it did not file a motion to dismiss or an answer raising defective service as an affirmative defense. The government, however, is under no obligation to take either step within the 120-day period. Indeed, until that 120-day period has expired, any attempt to seek dismissal on the grounds of defective service clearly would be premature. Finally, appellants argue that the letters sent to them by the United States Attorney's office waived Rule 4(j) because the letters "acknowledged" receipt of the summons and complaints. These letters cannot even arguably be read as waivers, however, because the United States Attorney stated therein that "[i]t will be necessary for you to serve our office pursuant to Rule 4 since we are not authorized by the Attorney General to waive proper service of process."

Finally, there is no merit to Musmeci's contention that the district court lacked jurisdiction to review the

decision of the magistrate judge and therefore that the appeal from the magistrate judge's decision should have been directly to this Court. A magistrate judge may act in the capacity of a federal district court under 28 U.S.C. § 636(c) *only* upon the express, written consent of both parties. FED. R. CIV. P. 73(b); *Archie v. Christian,* 808 F.2d 1132, 1137 (5th Cir. 1987) (en banc). Musmeci argues that, by asking the magistrate judge rather than the district court to dismiss the case, the government consented to final disposition by the magistrate judge. As noted, however, consent to trial by magistrate judge must be *express*; we have "refused to 'infer this statutorily required consent from the conduct of the parties.' " *Mendes Junior Int'l Co. v. M/V SOKAI MARU,* 978 F.2d 920, 922 (5th Cir. 1992) (quoting *Caprera v. Jacobs,* 790 F.2d 442, 445 (5th Cir. 1986)). *See* also *EEOC v. West Louisiana Health Servs., Inc.,* 959 F.2d 1277, 1281 (5th Cir. 1992) ("Consent to trial by a magistrate under section 636(c) cannot be implied."). Accordingly, the district court's assumption of jurisdiction was not error.

Conclusion

For the foregoing reasons, the judgments of dismissal are

AFFIRMED.

APPENDIX B

MINUTE ENTRY
WYNNE, M.J.
JANUARY 8, 1992

FILED
JAN 10 2:53PM '92

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROY McGINNIS,

CIVIL ACTION

VERSUS
LOUIS W. SULLIVAN,
SECRETARY OF HEALTH
AND HUMAN SERVICES

NUMBER: 91-2440

SECTION: "E" (2)

HEARING ON MOTION

APPEARANCES:

MOTION: of the defendant Louis Sullivan

(1) Motion to Dismiss

(2)

(3)

__ : Continued to

__ : No Opposition

1 : Opposition

__ : Local Rule 3.11, 3.12, 3.13

O R D E R E D

___ : DISMISSED AS MOOT

__ : DISMISSED FOR FAILURE OF COUNSEL TO APPEAR

__ : GRANTED

1__ : DENIED The plaintiff showed good cause for the failure to make timely service.

__ : OTHER

CLERK TO NOTIFY COUNSEL

DATE OF ENTRY JAN 13 1992

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
Illegible 11 27PM '92

ROY MCGINNIS	CIVIL ACTION
VERSUS	NUMBER: 91-2440
LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES	SECTION: "E" (2)

REPORT AND RECOMMENDATION

Plaintiff Roy McGinnis filed suit on July 5, 1991 seeking judicial review of the decision of the Secretary of Health and Human Services denying his applications for disability benefits and for supplemental security income under Titles II and XVI of the Social Security Act.

The Secretary filed a motion to dismiss the plaintiff's complaint without prejudice pursuant to Rule 4(j) of the Federal Rules of Civil Procedure for failure to make proper service within 120 days of filing his complaint.

DATE OF ENTRY FEB 6 1992

Rule 4(j) provides in part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Federal Rule of Civil Procedure 4(d) (4) provides that service should be made on the United States as follows:

> ...by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought or to an assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia,...

The record reflects that plaintiff sent a copy of the complaint and summons to the United States Attorney's Office in New Orleans by certified mail on July 12, 1991, but failed to deliver a copy of the summons and complaint to the office of the United States Attorney at that time. An Assistant United States Attorney wrote plaintiff's counsel on August 8, 1991 and advised that service on the defendant Secretary was not properly made under Federal

Rule of Civil procedure 4 and that the United States attorney was not authorized to waive proper service of process. Plaintiff did not deliver a copy of the summons and complaint to the office of the United States Attorney until December 9, 1991 following the defendant's filing of this motion to dismiss.

A dismissal of the plaintiff's complaint without prejudice is mandated in the absence of his showing of good cause for the failure to make proper service within the 120 day limitation period. *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 1985)

Plaintiff argues that there is good cause to allow him to proceed in this matter because the defendant acknowledged receipt of the complaint and summons by mail within 120 days of filing the complaint and proper service was subsequently made on the defendant. Plaintiff's counsel admitted that there was initially a technical deficiency in the service made on the defendant, but he stated that he was under the impression that the government waived proper service because it did not object to the Court's briefing order and did not file an answer raising a defense of insufficiency of service of process. Counsel states that out of an abundance of caution he obtained another summons from the Clerk of Court, but that he did not wish to have his client incur the added expense of a professional process server, and instructed his secretary to serve the documents on the United States Attorney. Counsel's secretary served the complaint and summons 154 days after the complaint was filed. Counsel also asked the Court to consider the fact that plaintiff's claim will be prescribed if the suit is dismissed.

In order to establish "good cause", there must be some showing of good faith on the part of the party seeking an enlargement of the service period and some reasonable basis for noncompliance within the time specified. *Winters v. Teledyne Movible Offshore, Inc. supra.*

The record reflects that the plaintiff made timely service on the Attorney General and the involved agency and sent the United States Attorney notice of the suit by mail. Plaintiff's counsel, after learning of the technical deficiency in the service, timely secured another summons and instructed a member of his staff to deliver the complaint and summons to the office of the United States Attorney. Counsel represented at the hearing that service was not accomplished as a result of a clerical error.

The record reflects that the plaintiff's counsel made a good faith effort to perfect service within the service period and that service was not accomplished as a result of clerical error. The Magistrate finds that the plaintiff has shown good cause for the failure to timely perfect service and therefore it is recommended that the motion of the defendant to dismiss be denied.

RECOMMENDATION

IT IS RECOMMENDED that the motion of the defendant Secretary to dismiss be DENIED.

2/5/92

/s/ Michaelle P Wynne

MICHAELLE PITARD WYNNE
UNITED STATES MAGISTRATE JUDGE

THE FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATION CONTAINED IN THIS REPORT WITHIN TEN DAYS FROM THE DATE OF ITS SERVICE SHALL BAR ANY AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL. *NETTLES V. WAINWRIGHT,* 677 F.2d 404 (5th Cir. 1982)

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
FEB 18 4:06PM '92

ROY MCGINNIS	CIVIL ACTION
versus	NO. 91-2440
LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES	SECTION: E/2

ORDER AND REASONS

The Magistrate Judge's report and recommendation concerning defendant's motion to dismiss the plaintiff's complaint was filed on a previous date. The Magistrate Judge recommended that the motion to dismiss be denied. In response defendant filed a motion for relief from the magistrate's order or, alternatively, objections to the magistrate's report and recommendation. The Court will consider defendant's memorandum as an objection to the Magistrate Judge's report and recommendation.

FACTS:

Plaintiff, Roy McGinnis, filed suit on July 5, 1991 seeking judicial review of the decision of the Secretary of

DATE OF ENTRY FEB 19 1992

Health and Human Services denying his applications for disability benefits and for supplemental security income under Titles II and XVI of the Social Security Act, 42 U.S.C. § 301 (1991).

The Secretary filed a motion to dismiss the plaintiff's action based on failure to properly serve the defendant. According to Rule 4(j) of the Federal Rules of Civil Procedure, service of the summons and complaint must be made within 120 days after the filing of the complaint. If plaintiff fails to do this he must show good cause why it was not done. When suing the United States service of the summons and complaint must be made on the U.S. Attorney in the district in which the complaint was filed. In addition service must be made on the Attorney General in Washington, D.C. Fed. R. Civ. P. 4(d) (4).

Plaintiff failed to properly serve the U.S. Attorney in the Eastern District of Louisiana. Plaintiff sent a copy of the summons and complaint to the U.S. Attorney's office in New Orleans by certified mail on July 12, 1991 but failed to *deliver* a copy of the summons and complaint to the U.S. Attorney at that time. A United States Attorney informed plaintiff's counsel of this error on August 8, 1991. Plaintiff's counsel did not attempt proper service until December 9, 1991, following the filing of defendant's motion to dismiss. This was 154 days after the complaint was filed.

ANALYSIS:

A dismissal of the plaintiff's complaint is required in the absence of a showing of good cause why proper service

was not made. *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 1985). In order to establish good cause, there must be some showing of good faith on the part of the party seeking an enlargement of the service period and some reasonable basis for noncompliance within the time specified. *Id.* Simple inadvertence, mistake of counsel or ignorance of the rule does not suffice to establish good cause. *Id.*

Plaintiff's failure to properly serve defendant is attributable solely to his own neglect. In a effort to excuse his conduct plaintiff seeks to put the blame on defendant. Namely, plaintiff argues that he assumed the government waived proper service because it did not object to the Court's briefing order and did not file an answer raising a defense of insufficiency of service of process within the 120 day period.

These excuses do not make good cause. The briefing order was issued before even the insufficient service was performed. The order merely sets up cut off dates. It never mentions waiver of defenses or whether plaintiff effected proper service. Therefore the government was under no obligation to object to the briefing order in a case in which it had not been properly served. *Virginia Collins v. Louis W. Sullivan*, 91-1820 (Magistrate Judge Africk, Nov. 12, 1991).

Plaintiff's other excuse also lacks merit. Clearly defendant was under no obligation to file an answer or motion asserting the failure to serve defense within the 120 day period. First, the U.S. Attorney does not have to answer a complaint he has never been properly served with.

F. R. Civ. P. 12 (a). Second, a defendant cannot file a motion to dismiss for failure to properly serve within the 120 days unless the 120 days has expired. Otherwise, the motion would be premature.

Plaintiff also argues that defendant had notice of the suit. Notice is irrelevant to the issue of proper service and has no bearing on the granting of a Rule 4 (j) motion. *Way v. Mueller Brass Co.*, 840 F.2d 803 (5th Cir. 1988).

Finally, plaintiff argues that a dismissal without prejudice will actually be a dismissal with prejudice since plaintiff's claim will be prescribed if the suit is dismissed. However, the fact that limitations have run does not prevent a Rule 4 (j) dismissal. *Redding v. Essex Crane Rental Corporation of Alabama*, 752 F.2d 10077 (5th Cir. 1985)

The Court finds that plaintiff had every opportunity to perfect service (defendant even informed plaintiff of the deficiency when there was still plenty of time left in the 120 day period to perfect service) but failed to do so due to his own negligence. Consequently the Court finds that defendant's motion to dismiss should be granted.

Accordingly,

IT IS ORDERED, that the defendant's objections to the Magistrate's report and recommendation are **MAINTAINED. IT IS FURTHER ORDERED** that the motion of defendant, Louis Sullivan, to dismiss plaintiff's claim is *GRANTED.*

New Orleans, Louisiana, February 18, 1992.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
FEB 18 4:06PM '92

ROY MCGINNIS	CIVIL ACTION
versus	NO. 91-2440
LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES	SECTION: E/2

JUDGMENT

Considering the record, the motion to dismiss filed by the defendant, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of defendant, Louis Sullivan, and against plaintiff, Roy McGinnis, **DISMISSING** plaintiff's complaint with costs and without prejudice.

New Orleans, Louisiana, February 18, 1992.

/s/ Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY FEB 18 1992

APPENDIX F

MINUTE ENTRY
LEMELLE, M.
JANUARY 8, 1992

FILED
JAN 8 12:51PM '92

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PEGGY MUSMECI	CIVIL ACTION
VERSUS	NUMBER: 91-2440
LOUIS W. SULLIVAN	SEC. "K" (1)

HEARING ON MOTION

MOTION:

(1) Defendant's Motion to Dismiss

__ : No opposition

1 : Opposition

O R D E R E D

__ : Granted

1__ : Denied: Unintentional delayed service resulted in no prejudice to movant.

__ : Other

/s/ Illegible
UNITED STATES MAGISTRATE JUDGE

CLERK TO NOTIFY ALL COUNSEL OF RECORD

DATE OF ENTRY **Jan 8 1992**

APPENDIX G

MINUTE ENTRY
ARCENEAUX, J.
FEBRUARY 20, 1992

FILED
FEB 24 3:49PM '92

PEGGY MUSMECI	CIVIL ACTION
VERSUS	NO. 91-2603
LOUIS W. SULLIVAN, ETC.	SECTION "K"

A motion for relief from order and/or alternatively objection to finding and recommendation was filed by the defendant, Louis W. Sullivan, M.S., Secretary of Health and Human Services ("the Government") and set for hearing on February 19, 1992. The Court has reviewed the record, pleadings, exhibits and the relevant law and finds that the matter shall be remanded to Magistrate Judge Ivan Lemelle for a report and recommendation consistent with this order.

In this social security appeal which was automatically referred to the magistrate judge pursuant to ULLR 19.02(b), a motion to dismiss was filed and noticed before Magistrate Judge Lemelle. Apparently with the belief that plaintiff and the Government had consented to his exercising his power to decide the entire matter under 28 U.S.C. § 636(c), the magistrate judge denied the Government's

DATE OF ENTRY FEB 25 1992

motion on the papers without a hearing.

From this order, the Government has filed the instant motion claiming that (1) the magistrate judge did not have the power to dispose of this matter and that (2) the magistrate judge did not employ the necessary standard that being a finding of "good cause" under Fed. R. Civ. Pro. 4(j), rather than "no undue prejudice.."

Considering the foregoing, the Court believes that the orderly administration of justice requires that this matter be remanded back to Magistrate Judge Ivan Lemelle for a hearing and a report and recommendation concerning whether plaintiff has shown good cause why service was not made within the 120 day period under Rule 4(j).

Finally, during the course of examining the Government's memorandum, the Court noted references, terminology and language which it finds offensive and totally unbecoming to an attorney for the Government. Specifically, but not exclusively, the uncalled for reference to the term "magistrate judge," Government counsel's reference to his opponent's "display of ignorance," and particularly counsel's footnote 1—including the insulting quotation from Alice in Wonderland—are not acceptable.

This Court expects courtesy from its bar and particularly from the Government's counsel. Mr. Schreiber is admonished that one more display of this nature will result in sanctions. Good law is diminished by gratuitous references such as these; bad law is certainly not enhanced by them. The Court leaves it up to Magistrate Judge

Lemelle in this instance to separate the two and has every confidence that he will do so. Accordingly,

IT IS ORDERED that this motion is remanded to Magistrate Judge Ivan Lemelle for a hearing and a report and recommendation concerning whether plaintiff has shown good cause why service was not made within the 120 day period under Rule 4(j).

/s/ George Arceneaux

APPENDIX H

FILED
APR 21 11:65AM '92

PEGGY MUSMECI	CIVIL ACTION
VERSUS	NO. 91-2603
LOUIS W. SULLIVAN	SECTION "K" (1)

§§§§§§§§§§§§§§§§§§

REPORT AND RECOMMENDATION

Plaintiff, Peggy Musmeci, filed suit on July 17, 1991, seeking judicial review of the decision of the Secretary of Health and Human Services denying her applications for disability benefits and for supplemental security income under Titles II and XVI of the Social Security Act.

The Secretary filed a motion to dismiss the plaintiff's complaint without prejudice pursuant to Rule 4(j) of the Federal Rules of Civil Procedure for failure to make proper service within 120 days of filing her complaint.

Rule 4(j) provides in part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show

DATE OF ENTRY APR 21 1992

> good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Federal Rule of Civil Procedure 4(d) (4) provides that service should be made on the United States as follows:

> ...by delivering a copy of the summons and of the complaint to the United States Attorney for the district in which the action is brought or to an assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, ...

The record reflects that plaintiff sent a copy of the complaint and summons to the United States Attorney's Office in New Orleans by certified mail on or about July 22, 1991, but failed to deliver a copy of the summons and complaint to the office of the United States Attorney at that time. As Assistant United States Attorney wrote plaintiff's counsel on July 24, 1991 and advised that service on the defendant Secretary was not properly made under Federal Rule of Civil Procedure 4 and that the United States Attorney was not authorized to waive proper service of process. Plaintiff did not deliver a copy of the summons and complaint to the office of the United States Attorney until December 9, 1991 following the defendant's filing of this motion to dismiss.

A dismissal of the plaintiff's complaint without prejudice is mandated in the absence of her showing good cause for the failure to make proper service within the 120 day limitation period. *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 1985).

Plaintiff argues that there is good cause to allow her to proceed in this matter because the defendant acknowledged receipt of the complaint and summons by mail within 120 days of filing the complaint and proper service was subsequently made on the defendant. Plaintiff's counsel admitted that there was initially a technical deficiency in the service made on the defendant, but he stated that he was under the impression that the government waived proper service because it did not object to the Court's briefing order issued in a similar case and did not file an answer raising a defense of insufficiency of service of process. Counsel states that out of an abundance of caution, he obtained another summons from the Clerk of Court, but that he did not wish to have his client incur the added expense of a professional process server, and instructed his secretary to serve the documents on the United States Attorney. Counsel's secretary served the complaint and summons 148 days after the complaint was filed.

In order to establish "good cause," there must be some showing of good faith on the part of the party seeking an enlargement of the service period and some reasonable basis for noncompliance within the time specified. *Winters v. Teledyne Movible Offshore, Inc., supra.*

In an unpublished decisiion, the Fifth Circuit ex-

plored the parameters of "good cause" under Rule 4(j). *Redmond v. Frank,* No. 90-3818, *slip op.* (5th Cir. June 14, 1991) (unpublished). In reversing the district court's order denying the government's motion to dismiss pursuant to Rule 4(j), the court stated:

> It is not relevant to a finding of good cause that a Rule 4(j) dismissal without prejudice may work prejudice in fact by barring the refiling of plaintiff's claim. *Norlock v. City of Garland,* 768 F.2d 654, 658 (5th Cir. 1985). Nor is it relevant to a finding of good cause that defendant had actual notice of the pending litigation since we have held that "actual notice of the litigation. . . is insufficient to satisfy Rule 4's requirements." *Way v. Mueller Brass Co.,* 840 F.2d 303, 306 (5th Cir. 1988). The fact that plaintiff was given no warning of her defective service before expiration of the 120-day period is also irrelevant to a determination of good cause; it is not the defendant's responsibility to ensure plaintiff has satisfied the procedural requirements for bringing suit. *McDonald,* 898 F.2d at 468. ... The language of Rule 4(j) indicates that dismissal is not left to the general discretion of the district court, but is mandatory unless good cause for noncompliance is established by plaintiff. *McDonald,* 898 F.2d at 468 n.1, *Winters,* 776 F.2d at 1305. ... While the district court enjoys broad discretion in determining whether to dismiss an action for ineffective service of process, because of the mandatory nature of Rule 4(j), a district court "abuses its discretion if it fails when so moved to dismiss the complaint when the complaining party (1) fails to properly serve the defendant and (2) fails

> to show 'good cause' for not making such timely service." *Stokes v. United States,* No. 87-5623, *slip op.* at 2 (5th Cir. Sept. 8, 1988) (unpublished). . . . Absent a showing of good cause for failure to effect service of process within the 120-day limit of Rule 4(j), it was not within the discretion of the district court to refuse to dismiss plaintiff's . . . claim.

Redmond, slip op. at 4-6.

In this case, there is no dispute that plaintiff failed to effect proper service upon the United States Attorney's office within the required 120 day period. The only issue before the court is whether plaintiff has shown good cause for failing to serve the United States Attorney's office within the 120-day period.

Espousing many of the arguments which failed in the *Redmond* case, plaintiff seeks an extension of the 120-day time limit within which to effect service upon the United States Attorney's office. Plaintiff argues that the U.S. Attorney's office had actual knowledge of the suit prior to the 120-day limit, though it was not formally served until after the 120-day limit. Plaintiff's counsel acknowledges the July 24, 1991 letter from the U.S. Attorney's office. This court has no choice but to apply the Fifth Circuit caselaw. Plaintiff's arguments do not establish good cause. The fact that the government had actual notice of the suit without being formally served is irrelevant to a finding of good cause when plaintiff fails to properly serve the government. Plaintiff was advised by defendant that she had not properly served the government long before the 120-day period had expired. This court must take note that the Fifth

Circuit has held that ' 'simple inadvertence or mistake of counsel or ignorance of the rules' does not constitute "good cause' for delay and cannot excuse the serving party for failure to comply with Rule 4(j)." *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1306 (5th Cir. 1985). In this case, we must follow the Fifth Circuit's mandate and find there is no good cause shown by plaintiff's counsel for his failure to properly perfect service.

RECOMMENDATION

Accordingly, the Magistrate Judge recommends that the government's motion to dismiss be **GRANTED** and that plaintiff's suit be **DISMISSED** without prejudice.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its service precludes a party from attacking the factual findings on appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 21st day of April, 1992.

/s/ Illegible

UNITED STATES MAGISTRATE JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PEGGY MUSMECI	CIVIL ACTION
VERSUS	NO. 91-2603
LOUIS W. SULLIVAN	SECTION "K" (1)

FILED
JUN 3 10:53AM '92

JUDGMENT

The Court, having accepted the Report and Recommendation of United States Magistrate Judge Ivan Lemelle, and having adopted it for the reasons assigned by order signed this day,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, Louis W. Sullivan, and that his motion to dismiss be **GRANTED** and that plaintiff's suit be **DISMISSED** without prejudice.

New Orleans, Louisiana, this 2d day of June, 1992.

/s/ George Arceneaux, Jr.

GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY JUN 4 1992

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PEGGY MUSMECI	CIVIL ACTION
VERSUS	NO. 91-2603
LOUIS W. SULLIVAN	SECTION "K"(1)

FILED
JUN 3 10:53AM '92

ORDER

An objection to the findings and recommendations of the magistrate judge was filed by plaintiff Peggy Musmeci and noticed for hearing on May 27, 1992. The matter was taken on the papers. The Court, having completed a de novo review of the record and pleadings, accepts the magistrate judge's report and adopts his recommendation to dismiss without prejudice this suit for failure to properly serve the United States within the 120 day required under Fed. R. Civ. P. 4(j).

This suit was filed on July 17, 1991. Plaintiff's counsel, by his own admission, attempted to serve the United States Attorney's Office in New Orleans by certified mail on July 22, 1991. An Assistant United States Attorney wrote to plaintiff's counsel on July 24, 1991, in-

DATE OF ENTRY JUN 4 1992

forming him that service was not properly made under Fed. R. Civ. P. 4, and that the United States Attorney was not authorized to waive proper service of process. Plaintiff was on notice then, only seven days after the filing of her complaint, that service had not been perfected on the United States Attorney's office. Under the rule, plaintiff had until November 14, 1991, to serve the United States properly.

Plaintiff's counsel did not have summons reissued until October 21, 1991, leaving 24 days for him to serve the United States Attorney's office. Counsel opines that because he did not want to spend the money necessary for a process server, he gave the summons to a staff member in his firm to serve. She did not serve the summons until December 9, 1991, after the instant motion was filed on December 4, 1991. Thus, plaintiff did not properly serve the summons on the United States Attorney until 145 after the complaint was filed.

Under *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1306 (5th Cir. 1985), plaintiff must demonstrate good cause for the delay. Simple inadvertence usually does not suffice. Plaintiff had 24 days after summons was reissued to serve the United States Attorney's office. There has been no reasonable basis for plaintiff's noncompliance demonstrated other than a clerical error. As such, good cause has not been demonstrated.

Furthermore, the fact that the case will have prescribed cannot bear on the court's inquiry as to "good cause" for noncompliance with the rule. Rule 4 requires this court to dismiss this case with prejudice as recommended by Magistrate Judge Ivan Lemelle and for the reasons

IT IS ORDERED that the government's motion to dismiss be **GRANTED** and that plaintiff's suit be **DISMISSED** without prejudice.

New Orleans, Louisiana, the 2d day of June, 1992.

/s/ George Arceneaux, Jr.

GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3269

FILED
SEP 15 1993

ROY McGINNIS,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary
of Health and Human Services,

Defendant-Appellee.

* * * * * * * * * * *

No. 92-3568

PEGGY MUSMECI,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary
Department of Health and Human Services,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 08/11/93, 5 Cir., ____, ____ F.2d ____)

(September 15, 1993)

Before GARWOOD, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate procedure and Local Rule 35), the suggestion for Rehearing En Banc in DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41
FOR STAY OF THE MANDATE

Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

(2)

No. 93-939

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROY MCGINNIS, ET AL., PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioners did not establish "good cause" under Fed. R. Civ. P. 4(j) for their failure to serve their summonses and complaints within 120 days after they filed their complaints.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-939

ROY MCGINNIS, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 2 F.3d 548. The opinions of the district court (Pet. App. A16-A20, A34-A36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1993. A petition for rehearing was denied on September 15, 1993. Pet. App. A37-A38. The petition for a writ of certiorari was filed on December 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, who were represented by the same counsel, commenced two separate suits against the Secretary of Health and Human Services seeking review of the Secretary's denial of their claims for disability benefits. Petitioner Roy McGinnis's complaint was filed on July 5, 1991; petitioner Peggy Musmeci's complaint was filed on July 17, 1991. Pet. App. A2.

Petitioners' counsel sent copies of the summonses and complaints by certified mail to the United States Attorney in New Orleans, the Attorney General, and the Secretary of Health and Human Services. The United States Attorney received petitioner McGinnis's complaint on or about July 16, 1991, and petitioner Musmeci's on or about July 23, 1991. Shortly thereafter, the United States Attorney notified petitioners by letter that their attempted service was ineffective under Rule 4 of the Federal Rules of Civil Procedure, and that he would not file an answer or other pleading until properly served. Pet. App. A2-A3.

On October 21, 1991, still within the 120-day period prescribed by Fed. R. Civ. P. 4(j) for service of process, petitioners' counsel caused summonses to be reissued in both cases. It was not until December 9, 1991, however, well beyond the 120-day period, that counsel properly served the United States Attorney. Pet. App. A3. Meanwhile, on December 4, 1991, the Secretary moved to dismiss petitioners' cases on the ground that service had not been effected within 120 days, as required by Rule 4(j). Pet. App. A3.

2. The district court granted the Secretary's motions to dismiss. Pet. App. A16-A20, A34-A36. In petitioner McGinnis's case, the district court noted that the summons and complaint had been improperly served within

the 120-day period required by Rule 4(j) because petitioner had not delivered them to the United States Attorney within that time period. *Id.* at A17. The court then held that dismissal of McGinnis's complaint was "required in the absence of a showing of good cause why proper service was not made." *Id.* at A17-A18. Finding that petitioner's "failure to properly serve [respondent] is attributable solely to his own neglect," that petitioner's proffered excuses were without merit, and that petitioner "had every opportunity to perfect service * * * but failed to do so due to his own negligence," the court concluded that petitioner had failed to establish good cause and accordingly granted respondent's motion to dismiss. *Id.* at A18-A19.

In petitioner Musmeci's case, the district court noted that "[s]imple inadvertence usually does not suffice" to establish "good cause" for a party's failure to effect proper service within the 120-day period prescribed by Rule 4(j). Pet. App. A35. Finding that "[t]here has been no reasonable basis for [petitioner's] noncompliance [with Rule 4(j)] demonstrated other than a clerical error," the court concluded that "good cause has not been demonstrated." *Ibid.* Accordingly, the court dismissed petitioner's complaint.

3. The court of appeals affirmed. Pet. App. A1-A8. The court held that, for purposes of Rule 4(j), "good cause 'would appear to require *at least* as much as would be required to show excusable neglect,'" and that "[a]ctions falling into the category of inadvertence, mistake or ignorance of counsel * * * do not establish good cause for extending the 120 day period for service." Pet. App. A5.[1] The court noted that petitioners' counsel

[1] The court of appeals rejected petitioners' reliance on *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct.

"learned that his initial efforts at service of process were defective soon after the United States Attorney received the complaints and summons," yet "he waited months before he had the summons reissued" and even then failed to effect service within the three weeks that remained. *Id.* at A6. The court concluded that the fact that petitioners' counsel "had instructed his secretary to serve the papers upon the United States Attorney * * * is surely not good cause or (even) excusable neglect." *Ibid.*

The court of appeals also found unpersuasive petitioners' arguments that the government had actual notice of the suits and that petitioners' suits are now barred by virtue of the applicable statute of limitations. The court explained that the absence of prejudice to the government and the existence of prejudice to petitioners were not dispositive, because "Rule 4(j) requires service to be timely made unless good cause for the delay is shown." Pet. App. A6. Finally, the court rejected petitioners' argument that the government had waived the requirements of Rule 4(j). The court held that the government had no obligation to file an answer or a motion to dismiss raising the service defect prior to expiration of the 120-day period. Moreover, the court observed that the United States Attorney had promptly notified petitioners by letter of both the defect in service and the government's unwillingness to waive that defect. *Id.* at A7.

1489 (1993), which involved the meaning of the phrase "excusable neglect" as used in Bankruptcy Rule 9006(b)(1). The court explained that *Pioneer* "does not alter our analysis" because the mode of analysis appropriate to [Bankruptcy] Rule 9006(b)(1) is not necessarily appropriate to Rule 4(j) if only because the standard articulated in Rule 4(j) is good cause, not *excusable neglect*." Pet. App. A5 n.1.

ARGUMENT

1. Petitioners contend (Pet. 5-10) that the decision of the court of appeals is inconsistent with this Court's decision in *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489 (1993). In *Pioneer*, the Court held that Bankruptcy Rule 9006(b)(1), which permits late filings in cases of "excusable neglect," authorizes such filings in some cases where the lateness is "caused by inadvertence, mistake, or carelessness." 113 S. Ct. at 1495. That holding was based on several factors: the "ordinary meaning of 'neglect'" (*id.* at 1494); "the policies underlying Chapter 11 [of the Bankruptcy Code] and the bankruptcy rules" (*id.* at 1495); "[t]he history of the present bankruptcy rules" (*ibid.*); and the meaning of the phrase "excusable neglect" as used in the Federal Rules of Civil Procedure (*id.* at 1496-1498).

As the court of appeals held (Pet. App. A5 n.1), *Pioneer* has no application in this case. The requisite showing under Rule 4(j) is "good cause," not "excusable neglect." Thus, the Court's analysis in *Pioneer*, which was founded upon the meaning and usage of the particular phrase at issue in that case, sheds no light upon the meaning of Rule 4(j), and the court of appeals properly declined to apply *Pioneer* in this case.[2]

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[2] Petitioners contend (Pet. 8) that *Pioneer* is relevant to this case because Fed. R. Civ. P. 6(b)(2) permits district courts to extend the time in which a party is required to act "where the failure to act was the result of excusable neglect." As petitioners concede (Pet. 8), however, they "did not file a motion to enlarge the time for service under" Rule 6(b)(2). Such a motion is a prerequisite to the court's ability to grant such an enlargement of time. See Fed. R. Civ. P. 6(b)(2) (once applicable time period has expired, court may act only "upon motion"). Moreover, because petitioners failed to seek relief under Rule 6(b) in the district court, neither that court nor the court of appeals had occasion to address

2. Petitioners also contend (Pet. 10-24) that review by this Court is warranted because the courts of appeals are divided over the meaning of the phrase "good cause" as used in Rule 4(j). According to petitioners (Pet. 12), the Second, Fourth, and Ninth Circuits have adopted "more lenient" criteria than those utilized by other courts in determining what constitutes "good cause." That contention is incorrect.

As the Seventh Circuit observed in *Geiger* v. *Allen*, 850 F.2d 330 (1988), "[c]ourts that have considered this issue * * * *agree* that counsel's inadvertent failure to serve a defendant within the statutory period does not constitute good cause. Likewise, half-hearted efforts to serve a defendant will not excuse a plaintiff from adhering to the 120-day deadline." 850 F.2d at 333 (emphasis added; citations omitted). None of the court of appeals decisions cited by petitioners is to the contrary.

The Fourth Circuit's decision in *Vorhees* v. *Fischer & Krecke*, 697 F.2d 574 (1983), has nothing to do with the meaning of "good cause." In that case, service on a West German defendant had not been made in accordance with a treaty that superseded the requirements of Fed. R. Civ. P. 4. The court of appeals held that the plaintiffs' case should not have been dismissed until they were given a reasonable opportunity to effect service in accor-

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this issue, and thus it is not properly before this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992).

Petitioners also claim (Pet. 9) that the standard for excusable neglect set forth in *Pioneer* should govern this case because the court of appeals "has said that in determining what is good cause in [Rule] 4(j) it is at least excusable neglect." Neither the court of appeals nor this Court, however, has suggested that the meaning of the phrase "good cause" as used in Rule 4(j) is to be determined by reference to the phrase "excusable neglect" as used in Bankruptcy Rule 9006(b)(1). Petitioners' contention is therefore without merit.

dance with the treaty. 697 F.2d at 576. The court had no occasion to address the question at issue in this case.

In *Zankel* v. *United States*, 921 F.2d 432 (2d Cir. 1990), the court observed that "a judge is certainly not required to treat inadvertence or ignorance of the Rules as 'good cause' or 'excusable neglect' for delay in service," and that in such cases dismissal under Rule 4(j) ordinarily would be proper. 921 F.2d at 436. The court found, however, that "the circumstances of this case are not ordinary" (*ibid.*), because "[a]lthough plaintiffs attempted to obtain clarification of the problem, the government did not disclose the specific character of plaintiffs' defective service until * * * 14 months after the suit was commenced," and indeed the government arguably "lulled plaintiffs into believing that their [initial attempt at service] constituted satisfactory service" (*id.* at 437). In this case, by contrast, the government informed petitioners of the service defect well within the 120-day period. Pet. App. A2-A3. Thus, this case presents the "ordinary" circumstance of inadvertence identified in *Zankel*, and dismissal was entirely appropriate even under the Second Circuit's analysis.

The Ninth Circuit cases cited by petitioners also are entirely consistent with the decision below. In *Hart* v. *United States*, 817 F.2d 78 (9th Cir. 1987) (per curiam), for example, the court rejected the plaintiffs' claim that "secretarial misdeeds" constituted good cause. 817 F.2d at 81. The court held that "[s]ecretarial negligence, if it exists, is chargeable to counsel," and that "these claims at best resolve to inadvertent error, which is not good cause." *Ibid.* Similarly, in *Wei* v. *Hawaii*, 763 F.2d 370 (9th Cir. 1985) (per curiam), the court held that "[t]he inadvertence of [plaintiff's] counsel * * * does not qualify as good cause for * * * failure to comply with Rule 4(j)." 763 F.2d at 372.

Finally, in *Whale* v. *United States*, 792 F.2d 951 (9th Cir. 1986), the plaintiff's failure to effect proper service was due to his attorney's mistaken belief that he could serve the United States Attorney by mail. The Ninth Circuit held that "counsel's belief that service on the U.S. Attorney by certified mail satisfied the requirements of Rule 4 does not constitute justifiable excuse." 792 F.2d at 954. The court distinguished its prior decision in *Borzeka* v. *Heckler*, 739 F.2d 444 (9th Cir. 1984), explaining that that case involved a "pro se plaintiff [who] alleged that he received erroneous information from the district court regarding service on [the] U.S. Attorney." 792 F.2d at 953. Like the plaintiff in *Whale*, and unlike the plaintiff in *Borzeka*, petitioners were represented by counsel and were not misled by the United States Attorney or the district court. Accordingly, dismissal was appropriate under the Ninth Circuit's test as well, and thus there is no conflict.

3. Petitioners also contend (Pet. 24) that they demonstrated "good cause" because "[t]he attempts taken by [their] counsel to effect service on the local United States Attorney were reasonable and constituted due diligence." That fact-bound contention does not warrant review. In any event, in view of the unjustifiable failure of petitioners' counsel to effect service upon the United States Attorney even after receiving ample notice of the service defect from the U.S. Attorney's Office, the court of appeals correctly held that the district court did not abuse its discretion in finding that petitioners failed to demonstrate "good cause."[3]

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[3] We note that, after entry of judgment in the court of appeals, Fed. R. Civ. P. 4 was amended to authorize service of process on United States Attorneys by certified mail and to give district courts discretion to excuse service defects even in the absence of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1994

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good cause. See Fed. R. Civ. P. 4(i)(1)(A) and (m) (eff. Dec. 1, 1993), *reprinted at* 113 S. Ct. *622*, *630* (1993); see also Notes of the Advisory Committee on Rules, 113 S. Ct. *644* (1993) (new Rule 4(i)(1)(A) "amends former subdivision (d)(4) to permit the United States attorney to be served by registered or certified mail"); *id.* at *647* (new Rule 4(m) "authorizes the court to relieve a plaintiff of the consequences of [failing to effect service within 120 days] * * * even if there is no good cause shown"). Petitioners do not contend that they are entitled to benefit from the more lenient provisions of the amended Rule, and thus there is no occasion for this Court to address the question whether this amendment to Rule 4 has retroactive application. See Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court".). The amendments to Rule 4 do, however, constitute additional factors weighing against review of this pre-amendment case.

(3)

Supreme Court, U.S.
FILED
MAR - 3 1994
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NO. 93-939

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROY McGINNIS, ET AL.,
PETITIONERS

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

On December 1, 1993 the Congressionally Amended Federal Rules of Civil Procedure, Rule 4 became law. The new Federal Rules of Civil Procedure, Rule 4 as it relates to the consolidated Roy McGinnis and Peggy Musmeci cases reads as follows:

(i) Service upon the United States, and its agencies, corporations, or officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the attorney general of the United States at Washington, D.C., and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency. . .

(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j) (1)...

Federal Rules of Civil Procedure, rule 4(i) (1) (A) (m) (effective December 1, 1993, reprinted at 113 S.Ct. 622, 630) 1993; see also notes of the Advisory Committee on Rules 113 S.Ct. 644 (1993) (new Rule 4 (i) (1) (A) "amends former

> subdivision (d) (4) to permit the United States attorney to be served by registered or certified mail"). Id. at 647 (new rule 4(m) "authorizes the court to relieve the plaintiff of the consequences of [failing to effect service withing 120 days]. . . even if there is no good cause shown").

Under the December, 1993 Federal Rule of Civil Procedure, Rule 4, the method of service used by Roy McGinnis and Peggy Musmeci (certified mail to the local United States attorney) would be adequate and effective. Furthermore, under the new Rule 4(m) a district court judge has greater discretion before dismissing a lawsuit because of a violation of the 120 day time limit for service. Prior to December 1, 1993 the judge had to dismiss the suit unless there was a good cause exception. The United States Attorney General in their Footnote No. 3, Page 8 and 9 of their opposition to the writ application concede that under the present law service on the United States in the Musmeci and McGinnis' cases would be effective.

Whether a congressional statute applies retroactively or prospectively has been broached by the United States Supreme Court in two cases - *Bradley v. School Board of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) and *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct.468, 102 L.Ed.2d 493 (1988).

The United States Supreme Court has previously

held in *Bradley v. School Board of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974) that:

> One is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustive or there is a statutory direction or legislative history to the contrary.
>
> *Bradley, supra* at 416 U.S. 711, 94 S.Ct. 2016, 40 L.Ed.2d 476.

Under *Bradley* the Supreme Court recognized two exceptions to its retroactive application of Congressional Enactments.

> The presumption does not govern where (1) there is clear congressional intent to the contrary, or (2) retroactive application would result in 'manifest injustice'.
>
> *Id.* at 711, 94 S.Ct. at 2016.

In *Bowen* the Supreme Court stated:

> Retroactivity is not favored in the law. Thus, congressional, enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.
>
> *Id.* at 208-09, 109 S.Ct. at 471-72.

Those circuits applying *Bowen* and against retroac-

tivity are Fourth Circuit, *Leland v. Federal Ins. A.D. M.'R*, 934 F.2d 524 (4th Cir. 1991), the Eighth Circuit, *Simmons v. Lockheart*, 931 F.2d 1226 (8th Cir. 1991), the Tenth Circuit, *Devargas v. Mason and Hanger-Silas Mason Co., Inc.*, 911 F.2d 1377 (10th Cir. 1990), cert. denied 111 S.Ct. 799, 112 L.Ed.2d 860 (1991), the District of Columbia, *Alpo Pet Foods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990) and the Federal Circuit, *Sargisson v. U.S.*, 913 F.2d 918 (1990).

Those circuits applying *Bradley* and favoring a retroactive application of congressional statutes include the First Circuit, *Aledo Garcia v. Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354 (1st Cir. 1989), the Seventh Circuit, *Federal Deposit Ins. Corp. v. Wright*, 942 F.2d 1089 (7th Cir. 1991); *Reliance Ins. Co. v. Zeigler*, 938 F.2d 781 (7th Cir. 1991), the Ninth Circuit, *Kruson v. International Telephone and Telegraph Corp.*, 872 F.2d 1416 (9th Cir. 1989) cert. denied 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990), and the Eleventh Circuit, *United States v. Peppertree Apts.*, 942 F.2d 1555 (11th Cir. 1991).

The *Bowen* analysis is distinguishable and not applicable in this case because in *Bowen* it involved an administrative regulation that attempted to retroactively effect the calculation of wage index for hospitals. The present case is not an administrative regulation but a congreessional statute. Also, as mentioned by Justice Scalia in *Kaiser Aluminum and Chemical Corp. v. Bonjourno*, 494 U.S. 827, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) the *Bradley* and *Bowen* decision could be logically distinguised in that *Bradley* applied in cases where judgment has been

rendered but the decision not yet final' whereas, *Bowen* would apply in all other cases. In the present case the judgment has been rendered but the decision is not yet final.

Under *Bradley* a review of the revised Federal Rule of Civil Procedure, Rule 4 and of the advisory notes and administrative and legislative history does not show that there is a clear congressional intent that the statute be applied prospectively. Therefore, we move to Rule of Construction No. 2 and ask whether the retroactive application of the new Federal Rule of Civil Procedure, Rule 4 would cause a manifest injustice in this case.

> A determination into whether retroactive application would result in manifest injustice requires the review of three factors:
>
> '(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.' *Id.* at 717, 94 S.Ct. 2019.
>
> *Joyner v. Monier Roof Tile, Inc.*, 784 F.Supp. 872, 878 (S.D. Fla. 1992).

The first factor is nature and identify of the parties. Claimants in the present case are two citizens of the United States and the United States Government. It is not between two private parties and does not involve private concerns. However, it is an issue of national concern in that it involves a citizen's right to have a rejection for benefits by the social security administration reviewed by a district court.

The second factor is whether the application of the new law "would infringe upon or deprive a person of a right that had matured or become unconditional". *Id.* 416 U.S. at 720, 94 S.Ct. at 2020. It has long been held that statutory changes which are remedial or procedural in nature apply retroactively while those that render substantive changes in the law apply prospectively.

> A law is 'substantive' if it creates rights, duties, and obligations, while a 'remedial' or 'procedural' law simply prescribes the methods of enforcement of those rights. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1445-46 (11th Cir. 1991).
>
> *Joyner, supra,* at 879.

The sections of Rule 4 that have been amended are merely procedural and they do not create any new rights. The United States Government has no substantial right that service be accomplished by mail as opposed to hand delivery. Nor does it have a substantial right to have a suit dismissed for failure to hand deliver the summons and complaint. Whereas, the plaintiffs, United States citizens do have a substantial right to have a decision of the Social Security Administration reviewed by the United States District Court.

The third factor is "whether a new and unanticipated obligation" would be imposed. *Bradley,* 461 U.S. at 720, 94 S.Ct. at 2020. The United States has no vested right in a previously existing remedial scheme for the manner of service. Applying the new Federal Rules of Civil Procedure,

Rule 4 to the parties in this case would not create any new liabilities that could not have been anticipated when the original suits were filed.

In short, there is no finding of manifest injustice by retroactively applying the revised Federal Rules of Civil Procedure, Rule 4.

In previous years when there have been amendements to the Federal Rules of Civil Procedure, Rule 4 the district courts have applied the new law retroactively. In *Gordon v. Hunt*, 116 F.R.D. 313 (S.D.N.Y. 1987) the court chose to apply the 1983 amendment to Federal Rules of Civil Procedure, Rule 4, imposing a 120 day time limit for service. The district court did this even though suit was filed before the effective date of the rule. Thus, they applied the rule retroactively. In *Benn v. Linden Crane Co.*, 370 F.Supp. 1269 (U.S.D.C.E.D. Penn. 1973) the district court recognized that service of process statutes are only procedural and do not create or affect individual substantive rights. Therefore, the court felt the procedural nature of the amended Federal Rule of Civil Procedure should have retroactive application. See also, *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537 (U.S.D.C. Hawaii 1965).

The law on service as it exists at the time this court considers this writ application is that plaintiffs' counsel's service by certified mail to the local United States attorney is effective and that the district judge has more discretion in not dismissing a suit for failure to comply with the 120 day service limit. Therefore, in these consolidated cases the writ should be granted and the matter remanded to the district court under the revised Federal Rules of Civil Procedure, Rule 4.

CONCLUSION

Under the *Bradley* test this Court should apply the revised Federal Rules of Civil Procedure, Rule 4 effective December 1, 1993 retroactively to the McGinnis and Musmeci cases. Amended Federal Rules of Civil Procedure, Rule 4 does not set forth that it should be applied only prospectively and there is no manifest injustice by applying it retroactively. At most, the United States would be inconvenienced by defending these cases.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Writ of Certiorari has been served upon the following named individuals by placing a copy of same in the U.S. Mail, postage prepaid, this 13th day of December, 1993.

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